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No. 93-908

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES J. REICH,
Petitioner,

v.

MARCUS E. COLLINS, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment requires states to provide a postdeprivation refund remedy if they impose economic and criminal sanctions against taxpayers who seek to challenge the validity of state taxation prior to paying the taxes.

2. Whether a state violates the Fourteenth Amendment when it deprives a taxpayer of all existing rights to seek a tax refund under existing statutory and case law.

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The National Association of Retired Federal Employees ("NARFE") files this brief *amicus curiae* in support of petitioner and urges this Court to grant the petition for a writ of certiorari to the Supreme Court of Georgia.

INTEREST OF AMICUS

NARFE is a nonprofit incorporated association having its principal place of business in Washington, D.C. From its original fourteen chapter members, NARFE has grown to a membership of approximately a half million federal annuitants (retirees and survivors) living through-

out the Nation and in various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and it has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

While NARFE principally focuses on legislative and administrative issues affecting federal retirees, on a handful of occasions, either directly or as *amicus*, NARFE has been involved in litigation in this Court. Most recently, NARFE has been involved in the litigation emanating from the states' discriminatory taxation of federal retirement benefits. Because this discriminatory taxation practice was widespread, NARFE participated as *amicus* in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). Similarly, NARFE members brought the case of *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), which challenged states' reliance on nonretroactive decisionmaking to deny refunds to federal retirees who had paid the taxes invalidated by *Davis*.

This case represents the third generation of *Davis* litigation. After this Court invalidated the discriminatory taxation in *Davis*, most states invoked nonretroactivity to deny refunds. Since *Harper* debunked that defense, states have fallen back to arguing that federal retirees had adequate predeprivation opportunities to challenge the taxation and, accordingly, they have no constitutional entitlement to relief. This case thus raises the question, left open in *Harper*, of whether "federal law . . . necessarily entitle[s the retirees] to a refund." *Harper*, 113 S. Ct. at 2520.

The majority of the 23 states that imposed *Davis*-type taxes have now refunded (or agreed to refund) those taxes to the federal retirees. Several states, however, are continuing their efforts to avoid their obligations to refund the taxes they unconstitutionally imposed on federal retirees. NARFE and its members in these remaining states are vitally interested in seeing that this litigation is finally put to rest and that refunds are finally paid. Moreover, because the issues raised in this petition affect the ability to recoup all types of unlawful taxes, NARFE and its members nationwide are interested in assuring that states cannot stack the deck against them and other taxpayers who seek refunds of erroneously or unlawfully collected taxes.[1]

STATEMENT

For over a decade, federal retirees in Georgia have been struggling to obtain refunds of the taxes improperly imposed by that State on their federal pensions. Their initial efforts to obtain this relief in federal court were thwarted on Tax Injunction Act grounds—the Eleventh Circuit held that Georgia's various procedures for challenging taxes, including its refund statute, provided a "plain, speedy and efficient" remedy that divested the federal courts of jurisdiction. *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986). Remitted to the state courts, the federal retirees have found that Georgia's remedies for the deprivation they have suffered are anything but plain, speedy and efficient.

In state court, the federal retirees first sought to obtain declaratory and injunctive relief preventing the state from collecting the unconstitutional tax for the 1988 tax year. In *Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E. 2d 74, 75 n.1 (1989), the court below held that this relief was unavailable because Georgia's refund statute provided an "adequate remedy" thus precluding the extraordinary injunctive relief sought.

Taking their cue from *Collins v. Waldron*, the federal retirees next sought to obtain refunds of the unconstitu-

[1] Counsel for petitioner and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.

tional taxes under Georgia's tax refund statute, O.C.G.A. § 48-2-35. After exhausting their administrative remedies, federal retirees throughout the state filed suits seeking refunds of the taxes imposed on their pensions between 1985 and 1988. This effort was rebuffed in *Reich v. Collins*, 262 Ga. 625, 422 S.E. 2d 846 (1992), *vacated*, 113 S. Ct. 3028, 3039 (1993) (*Reich I*). In *Reich I* the court below held that Georgia's refund statute [2]

> contemplates the situation where a taxing authority erroneously or illegally assesed and collects a tax under a valid law [but not] the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid.

Reich I, 262 Ga. at 628-29, 422 S.E. at 849.

This Court vacated and remanded *Reich I* for consideration of *Harper*'s mandate that federal Due Process requires "meaningful backward-looking relief" for all taxpayers when the state does not provide adequate predeprivation process. 113 S. Ct. at 2519-20. On remand, the court below concluded that Georgia does provide its taxpayers adequate predeprivation remedies. Relying on its tandem decision in *James B. Beam Distilling Co. v. Georgia*, Nos. S93A1217, S93SA1218 (Ga. Dec. 2, 1993) (WESTLAW: 1993 WL 503244),[3] the court held that Georgia's

[2] O.C.G.A. § 48-2-35(a) provides that "a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state."

[3] After remand from this Court, the court below concluded that the James B. Beam Distilling Co. lacked standing to seek refunds under Georgia's refund statute. *Beam*, 1993 WL 503244 at *2. Contrary to the explicit holding in *Reich I*, and the implicit holding of the decision below, the court "assumed" that the refund statute reached the taxation in dispute. *Beam*, 1993 WL 503244 at *5 n.3. The court did not, however, explain why the refund statute was applicable to liquor wholesalers but not federal retirees.

> declaratory judgment remedies . . . as well as statutory injunctive relief remedies . . . provide meaningful opportunities to taxpayers to litigate the validity of taxes alleged owing prior to the time when the taxes fall due.

Pet. App. at 4a (footnote omitted). The court further noted that relief was available under Georgia's Administrative Procedure Act as well as another statutory remedy that allowed taxpayers to proceed directly to court without exhausting any administrative remedies. Pet. App. 4a-5a.

While these routes may indeed be available to Georgia taxpayers, significantly, none protects a taxpayer from the imposition of financial and criminal sanctions. Thus the issue in this case is squarely framed: are the remedies available under Georgia's statutes sufficiently free of duress to excuse Georgia from its obligation to provide a post-deprivation refund remedy? Because Georgia's statutes are typical of many states, resolution of this question is necessary to give meaning to *Harper* and to the Fourteenth Amendment's mandate to protect taxpayers from unconstitutional state taxation.

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the rights of taxpayers to obtain refunds of taxes unconstitutionally or illegally imposed upon them. In Georgia alone this case implicates the rights of over 100,000 federal retirees. In perhaps as many as ten other states, resolution of this question could determine whether states may retain hundreds of millions of dollars of taxes unconstitutionally imposed on federal annuitants.

Moreover, the issues in this case have far-reaching consequences that eclipse their impact on federal retirees. The mandate of *Harper* is not limited to federal retirees—the

issue of the adequacy of state predeprivation remedies has arisen and will continue to arise in a broad array of state tax cases. Every other state court of last resort that has considered the scope of *Harper*'s mandate has reached conclusions vastly different from that reached by the court below. Accordingly, review by this Court is necessary to assure that the dictates of federal due process are applied uniformly and do not vary from state to state.

Finally, recent tax litigation has shown that financial considerations tend to make the doctrine of *stare decisis* more pliable in some courts than it might otherwise be. Presumably in an effort to protect states from the fiscal consequences of retroactive invalidation of taxes, some state courts have adopted attenuated constructions of state refund procedures by bending or ignoring precedents. This case presents the additional question whether the Fourteenth Amendment serves as a bulwark in such cases, preventing courts from eliminating preexisting remedies simply because following precedent might prove expensive. Review by this Court necessary to signal that the Constitution precludes state courts from depriving citizens of their property by changing the rules in the middle of the game.

1. Since this Court decided *Harper* last Term, three state supreme courts have issued opinions requiring refunds of their states' unconstitutionally imposed taxes. *See Hagge v. Iowa Department of Revenue and Finance*, 504 N.W.2d 448, 452 (Iowa 1993); *Brumley v. Utah State Tax Comm'n*, No. 910242 (Utah Sept. 2, 1993) (WESTLAW: 1993 WL 333583) (petition for reh'g pending); *Strelecki v. Oklahoma Tax Comm'n*, No. 77615 (Okl. Sept. 28, 1993) (WESTLAW: 1993 WL 379008) (petition for reh'g pending). Three other states, Montana, Arkansas and South Carolina, have agreed to pay the refunds.

Notwithstanding that the tide has decisively turned in the retirees' favor, several states continue to pursue their

war of attrition against the federal retirees. In both Oklahoma and Utah, for example, the states have sought rehearing arguing, among other things, that existing predeprivation remedies absolve them of their duty to provide refunds. Similarly, this is the principal issue being advocated on remand in *Harper* and in *Duffy v. Wetzler*, 113 S. Ct. 3027 (1993), *on remand*, Nos. 90-07800, 91-02056 (Supreme Court of N.Y. Appellate Div., 2d Dept.). In *Barker v. Kansas*, 112 S. Ct. 1619 (1992), *on remand*, No. 89-CV-666 (Dist. Ct. for Shawnee Cty., Div. 4), the state continues to resist paying refunds, even refunds of taxes imposed *after Davis* was decided, arguing that Kansas' declaratory and injunctive relief provisions excuse it from paying refunds. This identical argument is being made in the Supreme Court of Mississippi and in the various tribunals in Wisconsin in which the *Davis* litigation is there pending.

The arguments being advanced in these states are utterly irreconcilable with *Harper*. This Court held in *Harper* that a state incurs the obligation to provide "meaningful backward-looking relief" when "it places taxpayers under duress to pay a tax when due"; *i.e.*,

> when it "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before* their objections are entertained or resolved."

113 S. Ct. at 2519-20 & n.10, *quoting McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 and 38 (1990). Thus, in *McKesson*, because Florida imposed financial sanctions against taxpayers who sought to enjoin the imposition of the disputed tax, 496 U.S. at 37-39 & n.20, it was obligated to provide postdeprivation remedies. *See also O'Connor v. Atchison T. & S.F.R. Co.*, 223 U.S. 280, 286-87 (1912) (in order to challenge a tax's validity "the plaintiff . . . was not called upon to take the risk of having its contracts disputed and its business injured, and of finding the

tax more or less nearly doubled in case it finally had to pay.").

Other than the court below, all the state courts of last resort that have addressed this question have rejected the argument that putative predeprivation remedies excused the state from refunding the unconstitutionally imposed taxes. In *Hagge*, for example, the court specifically rejected the state's plea that there existed adequate predeprivation means by which the federal retirees could have pressed their claims. The court held that because Iowa imposed penalties for nonpayment of taxes and created a statutory lien against delinquent taxpayers' property, the taxes were paid under duress and the state was thus constitutionally obligated to provide taxpayers a postdeprivation remedy. 479 N.W. 2d at 451. Similarly, in *Strelecki*, the court held that Oklahoma's declaratory and injunctive relief provisions did not "afford [taxpayers] an adequate opportunity to secure relief from the burden imposed by a constitutionally infirm tax statute." 1993 WL 379008 at *8.

Thus the state courts of last resort are split on whether declaratory and injunctive relief encumbered with financial and criminal sanctions constitute adequate predeprivation procedures sufficient to excuse a state from providing a postdeprivation remedy. Absent guidance from this Court, federal retiree's rights under the Fourteenth Amendment will continue to be determined inconsistently on a state-by-state basis. Review by this Court is thus necessary to assure that the Fourteenth Amendment is applied uniformly to all federal retirees in all states.

2. The question of whether putative predeprivation remedies satisfy the requirements of the Fourteenth Amendment is not, of course, limited to *Davis* litigation. The decision below, for example, is predicated on the Georgia Supreme Court's holding in *Beam*, which involved a liquor distributor's challenge to a discriminatory tax under the Commerce Clause. *See also West Virginia ex rel.*

Paige v. Canady, 434 S.E.2d 10, 13 (W. Va. 1993) (recognition in Commerce Clause case that taxpayers subjected to duress are constitutionally entitled to refunds).

Not only has the question presented here arisen in different tax litigation, significantly, it has received different answers. For example, in *Service Oil Inc. v. North Dakota*, 479 N.W.2d 815, 821-22 (N. Dak. 1992), the court held that, notwithstanding the availability of injunctive relief, North Dakota's tax scheme did not provide taxpayers with adequate predeprivation relief. The court held that because North Dakota's tax provisions gave the Tax Commissioner authority to impose penalties up to five per cent of the tax due plus interest at the rate of one percent per month,

> North Dakota provisions do not, as a matter of federal constitutional law, provide North Dakota taxpayers with a meaningful opportunity to withhold payment and obtain a predeprivation determination of the validity of this discriminatory tax.

Id., 479 N.W.2d at 823.

The penalties Georgia imposes on taxpayers who withhold payment are far more onerous than North Dakota's. For example, Georgia imposes a penalty up to 25% of the tax due along with interest at the rate of one percent per month. *See* O.C.G.A. §§ 48-7-86, 48-2-40. In addition, Georgia subjects taxpayers who withhold their taxes to criminal sanctions, and it places an affirmative obligation on all tax commissioners and sheriffs to prosecute delinquent taxpayers. O.C.G.A. §§ 48-7-2, 48-16-12(b); § 48-2-81.

In *Beam*, the court below held that the state's authority to impose penalties "is not a financial sanction tantamount to an attempt to secure payment of taxes under duress since the penalties are subject to waiver by the revenue commissioner." *Id.* at 1993 WL 503244 *3. But to say that the sanctions are "subject to waiver" is to say that a taxpayer who withholds payment is subject to the risk

that these sanctions will be imposed. The risk of imposition of sanctions is the *sine qua non* of duress. *See O'Connor v. Atchison T. & S.F.R. Co.*, 223 U.S. at 286-87 (taxpayer is subject to duress if "called upon to take the risk" of sanctions). *See also Service Oil*, 479 N.W.2d at 822) (holding North Dakota's predeprviation remedies inadequate notwithstanding that "[t]he commissioner, for good cause shown, may waive all or any part of the penalty or interest.").

Thus, absent review by this Court, the Due Process Clause will continue to have different meanings in different states. In North Dakota, the risk that withholding taxes will garner penalties and interest is sufficient to require that the state provide a postdeprivation remedy. In Georgia, the risk is also present, yet a different rule applies—no taxpayer can challenge a tax unless he or she is prepared to bear the risk of seizure of property or imprisonment. Review by this Court is necessary to assure that there is but one standard for determining when the possible imposition of penalties subjects taxpayers to "constitutionally significant duress." *Harper*, 113 S. Ct. at 2519-20 n.10.

3. In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), this Court held that the state court violated the Due Process Clause by judicially depriving the taxpayer of all available remedies for challenging the validity of a tax. Specifically, the Court held that a taxpayer has a property interest in a remedy procedure, and this property interest is protected by the Due Process Clause:

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id., 281 U.S. at 682 (footnotes and citations omitted).

The facts in *Brinkerhoff-Faris* are strikingly similar to the case at bar. There, a taxpayer brought a suit in state court alleging that it was being taxed unconstitutionally. The state supreme court denied relief by reversing settled law and holding that the taxpayer should have followed a predeprivation procedure before the tax commissioner. At the time of that holding, it was too late for the taxpayer to pursue the predeprivation remedy. The Court held that the taxpayer had a property interest in the remedy that it did pursue, and the state could not revoke that remedy after the fact, at a time when the taxpayer had no other remedy available. *Id.*, 281 U.S. at 682.

The federal retirees are in precisely the same situation as the taxpayer in *Brinkerhoff-Faris*. At the time they elected to pursue the refund remedy under O.C.G.A. § 48-2-35, it was settled law that refunds were available in the situation at issue in this case. *Collins v. Waldron*, 259 Ga. at 583, 385 S.E.2d at 75 n.1; *Henderson v. Carter*, 229 Ga. 876, 878, 195 S.E.2d 4, 6 (1972); *Wright v. Forrester*, 192 Ga. 864, 867, 16 S.E.2d 873, 875 (1973). Therefore, they have a property interest in the remedy they elected—refunds pursuant to O.C.G.A. § 48-2-35—and the lower court's decision extinguishing that right at a time when federal retirees had no other remedy available violated the Due Process Clause. *Brinkerhoff-Faris*, 281 U.S. at 682.[4]

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[4] Like the situation here, *Brinkerhoff-Faris* dealt with a remedy procedure that had previously been sanctioned by the state supreme court. This is by no means, however, the only way a protectable property interest can arise. Protectable property interests can arise in a wide variety of ways, including legislative enactments, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 543 (1985), case law, *Brinkerhoff-Faris*, and other sources. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests "are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law . . . ."). Thus, irrespective of whether the federal retirees' property interest in the remedies provided by the refund statute arose out of the plain language of the statute, 50 years of judicial precedent, or

The court below has expediently shuffled and reshuffled the remedies that supposedly are available to Georgia taxpayers. First, in dissolving the injunctive relief the federal retirees obtained for the 1988 taxes, the court below held that Georgia's refund statute provided relief. Then, when the federal retirees sought relief under the refund statute, the court below concluded that that statute did not apply. The court "t[ook] this opportunity," 262 Ga. at 629, 422 S.E. 2d at 849, to create an entirely new remedy: the federal retirees were only entitled to a refund if they had paid their taxes under protest. Now, after remand of this case and *Beam*, and without any mention of payment under protest, the court below assumes that the refund statute applies to the taxpayers in *Beam* (who do not have standing under that statute), but it does not apply to federal retirees (who indisputably would have standing under that statute).

To be sure, the court below is the final arbiter on issues of Georgia state law. Were there no property interest at stake here, the lower court's result-oriented rulings would simply be injudicious and unseemly. But because the federal retirees have a property interest in the remedies Georgia has created, the Constitution prohibits the court below from taking the federal retirees' property. Review by this Court is necessary to assure that taxpayers' property interests cannot be so easily extinguished by facile interpretations of state law.

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an explicit holding by the court that the refund statute provided an adequate remedy at law for federal retirees affected by *Davis*, "the State may not finally destroy [that] property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 (1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Georgia should be granted. Moreover, because the opinion below is in irreconcilable conflict with *Harper, McKesson and O'Connor v. Atchison T. & S.F.R. Co.*, this Court should summarily reverse. *See, e.g. El Vocero de Puerto Rico (Caribbean International News Corp.) v. Puerto Rico*, 113 S. Ct. 2004, 2006 (1993) (granting petition for certiorari and reversing judgment below); *United States v. Nachtigal*, 113 S. Ct. 1072, 1074 (1993) (same).

Respectfully submitted,

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